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No. 84-1294

In The
Supreme Court of the United States
October Term, 1984

THE VILLAGES, INC.,

Petitioner,

v.

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

The Commission respectfully disagrees with the Villages' statement of the question presented for review. The following is a more factually accurate statement of the question which would emerge from examination of the record below:

> Is the use of residentially zoned real estate by a corporation which hires and trains two adults to serve as houseparents and to live in a corporate-owned facility for the purpose of providing foster care (for a fee of $36.00 per day per child) to ten abused, abandoned, or neglected children selected and placed in the facility by the corporation permitted by the provisions of the Dwelling Districts Zoning Ordinance of Marion County, Indiana, which provisions authorize foster family care as an accessory use, but not as a primary use, of residentially zoned real estate?

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Ordinance

Dwelling Districts Zoning Ordinance, Code of Indianapolis and Marion County, Indiana	i, 2, 5, 6, 6 n.3, 7, 11

Respondent, The Metropolitan Development Commission of Marion County (hereinafter referred to as the "Commission"), respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion issued below by the Court of Appeals of Indiana, Third District. That opinion is reported at 464 N.E.2d 367 and is contained as an appendix (Pet., 1a-16a) to the petition of The Villages, Inc. (hereinafter referred to as the "Villages"). The Commission accepts the sections of the Villages' petition titled Parties Below (Pet., i), Reports of Opinions Below (Pet., 1) and Jurisdiction (Pet., 2). The jurisdictional statement is accepted only to the extent it concerns jurisdictional and not substantive issues.

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STATEMENT OF FACTS

The Villages is a Kansas not-for-profit corporation doing business in Indiana. The stated purpose of the corporation is to establish group homes, each of which is designed to provide foster care and housing to approximately ten (10) abandoned, abused, and neglected children in a setting which simulates a family environment (Pet., 2a, 19a). The foster care facilities are staffed by houseparents hired by the Villages to reside with children who are unrelated to the houseparents or to each other, and who are wards of a court or a government agency (Pet., 2a, 19a). Various government agencies pay the Villages approximately thirty-six dollars ($36.00) per day per child in return for the service which the Villages provides (Pet., 2a, 19a).

Prior to commencing operation of the foster care facility which is the subject of the instant cause, the Villages established facilities in Evansville, Bloomfield, and Bedford, Indiana. Those group homes were established in three (3) separate Indiana counties, and apparently each was established without any adverse encounter with the local zoning authorities. No evidence was introduced by the Villages to disclose whether any of the above listed Indiana cities serving as sites for Villages' facilities had zoning ordinances like, or similar to, the Dwelling Districts Zoning Ordinance of Marion County, or indeed if those communities had residential zoning ordinances at all. The facility which is the subject of this cause was the first Villages' group home opened in Marion County, Indiana.[1]

The chronology of events preceding the establishment of the group home at issue is instructive. The Villages entered an unconditional agreement to purchase the subject property in October, 1982 (Pet., 3, footnote 1). On or about November 19, 1982, a Villages' representative met with a Marion County zoning official[2] for the purpose

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[1] During the Commission's appeal of the trial court decision to the Court of Appeals of Indiana, the Villages commenced the operation of the facility in question. Shortly thereafter, the Villages opened a second group home in Marion County, and both facilities are presently staffed by houseparents, and each has a compliment of approximately ten (10) foster children.

[2] The meeting was held at the Villages' request and included a City-County Council member, a Villages' representative, and the Administrator of Marion County's Division of Planning and Zoning. The Administrator of Planning and Zoning was the appropriate official within Marion County to render opinions and positions relative to proposed uses and zoning classifications or zoning procedures necessary to authorize proposed uses of Marion County property.

of outlining and seeking sanction for the intended use of the real estate (Pet., 20a). Uncontroverted evidence at trial disclosed that the Villages' representative was informed during the November 19th meeting that the proposed group home could be established in a one-family zoning district only if a rezoning or a zoning variance was obtained (Pet., 20a). Thus, the Villages' assertion in its petition is accurate in pointing out that it was only after the Villages had entered an unconditional agreement to purchase the property in October, 1982, that Marion County zoning authorities first asserted that the proposed group home would constitute a zoning violation (Pet., 3, footnote 1). The Villages' claim is certainly misleading, however, because the Villages fails to point out that it was not until November, 1982, that zoning authorities were first asked by the Villages to render an opinion as to the use in question. There is no evidence in the record to suggest that any Marion County zoning official knew of the Villages' intended use of the subject real estate until at least several weeks after the Villages unconditionally committed itself to purchase the site.

During the first meeting between the Villages' representative and the Administrator of Planning and Zoning, the Villages was informed of the position of Marion County zoning authorities. That position never changed during the entire course of these proceedings. In fact, it was later reduced to writing (Pet., 20a, 21a).

Approximately seven (7) weeks following the meeting with the Administrator of Planning and Zoning, the Villages closed the purchase of the single family dwelling (Pet., 20a). Further meetings between Indianapolis (Marion County) zoning officials and Villages' representatives

in January and February, 1983, failed to resolve the parties' differences. After being informed of the Villages' intention to proceed with the development and use of the subject site for a group home (Pet., 21a), a lawsuit was filed seeking a preliminary and permanent injunction. Following the close of the evidence presented at the preliminary injunction hearing, the trial court consolidated the preliminary injunction hearing with the permanent injunction request and ruled in favor of the Villages, thus denying the Commission an injunction.

The Commission appealed the trial court decision to the Court of Appeals of Indiana, which Court reversed the lower court. The Villages petitioned the Supreme Court of Indiana to grant discretionary review. However, after entertaining oral argument and the parties' briefs, the Supreme Court of Indiana denied transfer.

Following remand to the trial court, the Villages' objected to the issuance of an injunction against the use of the subject real estate and asserted its entitlement to a further evidentiary hearing. The Commission objected to such an evidentiary hearing. This controversy was the subject of an oral argument presented to the Court of Appeals of Indiana in January, 1985. During argument, counsel for the Commission maintained that in view of the Court of Appeals' decision in favor of the Commission, an injunction should issue. However, the Commission suggested to the Court of Appeals that the effective date of the injunction be delayed until the summer of 1985 so that the foster children presently being housed in the subject facility might complete their school semesters without interruption. That proposal was ultimately adopted and an injunction subsequently issued requiring the

Villages to cease operation of the subject group home on and after June 30, 1985 (Pet., 7, footnote 2).

The Villages has been and remains eligible under applicable Indiana law to seek a rezoning of the property to a classification permitting charitable and philanthropic institutions. The Villages also is free to apply to Marion County's board of zoning appeals for a zoning variance. Ironically, the Villages was informed by the Administrator of Planning and Zoning during the November, 1982, meeting that the Marion County zoning staff probably would support a rezoning or variance petition filed by the Villages for the proposed foster home. Of course, the staff position was not guaranteed, and it could not be formulated until and unless such a petition was presented for analysis and consideration on its merits. Despite the expressed willingness of the zoning authorities to cooperate, however, the Villages has, until now at least, chosen not to seek either a rezoning or a variance. Rather, the corporation has voluntarily and steadfastly refused to utilize these available procedures.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Neither The Decision Below Nor The Record Raises The Question Presented By The Villages.

Even if this Court answers the Question Presented by the Villages, the actual controversy existing between these litigants will be no closer to resolution. Despite the Villages' insinuation to the contrary, Marion County's Dwelling Districts Zoning Ordinance (hereinafter referred to as the "DDZO") permits "a married couple and several foster children [to reside] together as a single housekeeping unit in a home situated in an area zoned for one fam-

ily dwelling[s]." In fact, the DDZO specifically provides for foster family care as an *accessory* use in all one-family residential districts.[3] However, a requirement of the ordinance is that the foster family care be " . . . customarily incidental accessory and subordinate in area, extent and purpose to the primary use. . . ." (Pet., 43a).

In the case of a family who cares for foster children in order to supplement its own numbers, or to fill the void of children never born or now departed, these accessory use requirements are easily and routinely met in Marion County. However, where, as in the instant case, a corporation purchases and staffs a facility for the *sole* purpose of establishing a location at which the corporation may carry out its business of providing foster care in return for a fee, the Court of Appeals of Indiana correctly recognized foster care as the *primary* use of the property. Having done so, the Court of Appeals determined that the Villages' use was a violation of the DDZO.

II. The Decision Of The Court Of Appeals Rests Firmly Upon Indiana's Established Principles Dealing With Statutory Construction, And The Decision Presents No Substantial Federal Question.

In order to confirm that the decision below rests upon a construction of Indiana law, and not upon federal constitutional principles, one may begin by examining the trial court judgment. The trial court, which ruled in favor of the Villages, failed to address constitutional issues in

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[3] The DDZO also permits "Group homes, as regulated in section 2.18." However, all parties agree that the Villages' use does not fall within the definition of group home provided by the DDZO (Pet., 2a, footnote 1).

its findings of fact (Pet., 17a-21a) or in its conclusions of law (Pet., 21a, 22a). In pertinent part, the trial court concluded that:

> The use of the subject real estate by an organization which employs a married couple to work in said facility on an around the clock basis to provide care and shelter for abused, abandoned, or neglected children is a one-family dwelling use and therefore is a permitted primary use in a dwelling district zoned D-3 because such use fits within the plain and ordinary meaning of the term "family".
>
> Furthermore, the providing of care to foster children is contemplated by the ordinance by virtue of the fact that foster family care is expressly permitted under Section 2.15(10) of the Dwelling District [sic] Ordinance.

(Pet., 21a, 22a).

The above quoted language should make clear that the trial court based its decision on its belief (later determined to be in error) that the DDZO, not the United States Constitution, authorizes the Villages' use of the property. When the Court of Appeals of Indiana reversed the trial court judgment, the Court of Appeals expressly reached its decision based upon application of Indiana's rules of statutory construction. Early in its opinion the Court of Appeals concluded that " . . . the issue at bar is not constitutional in nature, but instead involves a question of statutory interpretation." (Pet., 3a). The Court of Appeals used firmly grounded and long established rules of statutory construction in analyzing the case and in reaching its decision. The following passage from the Court of Appeals' opinion lends useful insight into the Court's analysis of the issue presented:

> In this case, the legal maxim *expressio unius est exclusio alterius*[2] is particularly useful in ascertaining the legislative intent. In construing a statute, it is equally important to recognize what is not said as it is to recognize what is said. *Van Orman v. State*, (1981) — Ind.App. —, 416 N.E.2d 1301. In drafting the DDZO, the local legislative body promulgated separate and specific provisions for single-family dwellings and for foster care within the D-3 district. The specific provision for foster care as an accessory use necessarily excludes foster care from the general section authorizing single-family dwellings. Any other construction renders this specific regulation of foster care superfluous. Local legislators would not logically provide for foster care as an accessory use if it were also contemplated as a single-family dwelling use. The trial court erred as a matter of law in finding the Villages' group home to be a single-family dwelling.
>
> Nor does the group home qualify as an accessory use. Any accessory use must be subordinate in area, extent, and purpose to the primary use of the lot. The Villages is a corporation which intends to hire two houseparents to provide care for ten foster children. These children are placed in the group home under separate contracts, and The Villages is compensated at a rate of $36 per day per child. Obviously, foster care is not subordinate to, but actually is the primary use of the proposed group home. As such, the proposed group home is not permitted as an accessory use, nor is it allowed under any category within the D-3 district.[3]

(Pet., 4a, 5a, footnotes omitted).

III. The Decision Of The Court Of Appeals Is Consistent With This Court's Prior Decisions.

In its opinion, the Court of Appeals of Indiana looked to this Court's prior decisions for guidance. The Court

noted that in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), it was decided that local government may properly regulate the use of land by creating classifications designed to promote public health, safety, morals, and general welfare (Pet., 3a). Further, the Court of Appeals took cognizance of the decisions in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) and *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) in which this Court recognized that it is constitutionally permissible for the police power of local units of government to be used to limit the number of unrelated individuals living in residential districts (Pet., 3a). Having satisfied itself that local government may constitutionally regulate occupancy of residential structures by unrelated individuals, the Court of Appeals concluded that the facts before it presented a question of statutory construction, and not a question of constitutional law (Pet., 3a).

In its petition the Villages cites numerous cases decided by this Court. Yet, none are directly on point, and none alter the *Village of Belle Terre* decision which upholds the right of local legislatures to impose restrictions on the number of unrelated individuals occupying a dwelling within a one-family dwelling area. Upon careful scrutiny, it is clear that virtually all of the Court decisions cited by the Villages, including those decided by the U.S. Supreme Court, are inapposite. This is true in part because the issue being argued by the Villages is not the issue which was decided in the instant case. An example of the Villages' misplaced argument follows:

> Finally, exclusion of foster families from single-family districts violates in a most basic fashion the rights of association, privacy, and family integrity of the foster parents and foster children and does not serve a countervailing compelling governmental interest.

(Pet., 9, citation omitted).

The Villages may be correct in its summarization of constitutional law, but the Villages has inaccurately depicted the facts of the instant case. Marion County has not excluded foster families from single-family districts. Instead, Marion County has excluded this particular corporate owned and operated foster care facility because it is clearly the *primary* use of the property in question. All foster family care which is *accessory* to a permitted primary use may be conducted in single-family districts in Marion County. This was true prior to the Court of Appeals' decision, and it remains true following that decision.

IV. The Facts Of This Case Are Peculiar, And This Case Is Unlikely To Have An Impact Upon Persons Other Than The Parties To This Action, Or Upon Localities Other Than Marion County, Indiana.

The trial judge specifically stated that the facts in the case at bar are peculiar, and the judge limited his ruling to the particular facts before him. The trial court wrote:

> In conclusion, however, it should be established that were the character of the use to change or expand beyond that which is proposed, then it might become an unpermitted use. Should it become less of a surrogate family and more of an institution, then an entirely different result could be expected. In that regard,

> therefore, the court expressly limits its decision to the particular facts found, as delineated in the courts [sic] findings, items 7 through 17.

(Pet., 31a).

Like the trial court, the Court of Appeals of Indiana reached its decision based upon a construction of Marion County's DDZO as applied to the specific facts of this case. The Court of Appeals adopted neither a broad and sweeping, nor a narrow and restrictive, definition of "family" which will stand as precedent in the State of Indiana. This case simply presented no need for the Court to fashion such a definition. Instead, the Court was required to, and did, engage in careful and highly individualized construction of a single zoning ordinance which pertains in only one (1) of Indiana's ninety-two (92) counties.

The Villages has made no claim, as it could not, that the continued existence of any of the Villages' foster care facilities in other Indiana counties is in any way affected by the instant decision. Those facilities continue to be governed by the zoning regulations in effect in the counties wherein the facilities operate. Simply stated, the question presented by the Villages in its petition, even if rephrased to appropriately reflect the factual circumstances of the instant cause, does not have the requisite public importance to warrant review by this Court. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). It is well established that certiorari should not be granted merely to review the facts of a case. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 580 (1924); *United States v. Johnston*, 268 U.S. 220 (1925); *Rudolph v. United States*, 370 U.S. 269 (1962); and, *Tacon v. Arizona*, 410 U.S. 351 (1973).

CONCLUSION

The decision reached by the Court of Appeals of Indiana was dependent entirely upon the facts which the Court found, and the result is likely to impact only the parties to this appeal. The question below was carefully weighed and exhaustively treated by way of a lengthy trial court decision, a written Court of Appeals opinion, and consideration by the full five (5) member Supreme Court of Indiana which elected to deny transfer only after giving the parties an opportunity to present briefs and oral argument. The Villages received fair treatment during every stage of the proceedings. When the injunction becomes effective on June 30, 1985, the Villages will have operated the facility for approximately two (2) years. The Villages still has certain administrative remedies available under Indiana law by which the corporation may seek belated sanction for its group home. These remedies have been available to the Villages for the past two (2) years, and they will continue to be available between now and June 30th and beyond.

For all of the reasons set forth herein, the Commission respectfully prays that the petition be denied.

Respectfully submitted,

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